custom database application in other software packages, it is not possible to insure that the integrity of the data will be maintained. This is because customer database applications are typically designed to have links whereby different data fields are interrelated and internal calculations are made. It cannot be assured that these internal links and calculations will be accurately reflected and reproduced if the DBF file is viewed with a software package other than its native application. Tr. 2046-2048.

80. The paper records produced by Kay in March 1995 (the customer maintenance screen printouts), WTB Ex. 347, and in November 1995 (the loading reports), WTB Ex. 19, contain virtually all of the same data that would have been contained in the DBF files. These productions actually were more accurate and reliable that the DBF files. Prior to producing the customer maintenance screen printouts in March 1995, Kay and his staff went through the more than 850 records, customer-by-customer, and did their best to audit the data to make sure it was accurate by matching it against the paper files and records. Tr. 1045-1046.

81. Kay generally performed the backups of the computer system. Backups of the Xenix system did not work properly, and the data was lost when the system ultimately crashed following the Northridge earthquake. Kay had backed up the Xenix system approximately every couple weeks, using a single backup tape that was overwritten each time. Kay understands that some sort of "file-allocation" table error on the Xenix server was duplicated on the backup, resulting in data loss. Tr. 1092. The last backup of the Xenix system would have occurred in January 1994. Tr. 1094. Kay later started doing backups of the DOS system in approximately July 1994. Tr. 1080-1090. On the DOS system, he performs backups approximately once a week and uses about three backup tapes which he rotates, overwriting the oldest one first. Tr. 1089-1091. Craig Sobel developed the backup routine, and Kay understood that it first erased the old files from the backup tape and then copied the current files from the server to the tape, so that the practical effect was "overwriting" the tape. Tr. 1090-1091.

82. Kay also had a practice under the old Xenix system of periodically purging deleted accounts from the billing system. Tr. 1094. Craig Sobel explained that when files are "deleted" from the system, they actually are simply marked for deletion (*i.e.*, a delete flag is set), but are not actually purged until the database is "packed". Tr. 1428-1429. The Xenix system was last purged in approximately September 1993, and there have been no purges of the DOS system. Tr. 1094.

83. Just as it had never occurred to Kay to produce copies of the DBF files in response to Bureau requests for information, Tr. 1044, he likewise never considered producing the backup tapes in response to the 308(b) Request. Tr. 1095. When the idea was suggested to him during the hearing, however, he noted that, in addition to the fact that he had never previously provided any government agency with information in magnetic form, the backup tape cartridges would also have included a wide range of materials on his computer system (including confidential correspondence with legal counsel), and, like the DBF files themselves, would not reasonably have been responsive to the information request. Tr. 1095.

C. Construction and Operation Issue

84. This issue may be divided into two parts: (1) whether Kay willfully or repeatedly violated rules regarding timely construction and/or permanent discontinuance of authorized facilities, and (2) whether Kay willfully or repeatedly violated rules regarding system loading.

(1) Timely Construction and/or Permanent Discontinuance

85. Kay generally constructed facilities promptly after license grant, if not before. Tr. 959. Indeed, he had a financial incentive to do so, in that the sooner he constructed and got a station operational, the sooner he could place customers on it and start generating revenue. Tr. 2366-2367. Often repeaters were pre-constructed, in which case the construction date is the date of license grant. Tr. 959. In cases where Kay converted users' existing licenses to private carrier or SMR systems licensed to Kay, the facilities were already constructed upon grant of the

conversion authorization. Tr. 900-901. Similarly, facilities associated with authorizations which Kay acquired by assignment were deemed "constructed" as of the date the assignment of license application was granted. Tr. 901. Even where application was made for a new facility, Kay often pre-constructed stations, installing all the hardware, tuning the transmitter, and arranging for it to be remotely activated upon receipt of authorization. Tr. 2366. Even when not pre-constructed, new installations were typically completed within two to three months after grant. *Id.*

86. When Kay completed construction of a new location, he jotted down the date on a slip of paper which he would stick in a file. When the 800A letter[10] arrived from the Commission he would then transfer the date and other pertinent information onto the 800A letter, mail it back to the Commission, keep a copy in the file, and discard the note. Tr. 958, 2367-2368.

87. Kay did not otherwise keep records specifically recording the construction completion dates of his facilities. This was due primarily to the way his systems were configured and how his business was operated. The measurements and alignment of Kay's repeaters was typically done weeks or months in advance of actual installation. Tr. 953. When equipment arrived from a vendor, it was untested, not tuned, and not assigned to a working frequency. Tr. 954. The equipment was removed from the box, aligned, tuned, power levels were set, and then set up on a test frequency. At that point it was placed on a shelf along with the other inventory and was not yet part of a particular station or call sign. Tr. 955. When a repeater was needed, one of these conditioned radios was pulled from the inventory. When a technician went to service a repeater site, he would frequently take one of the inventory repeaters with him and, if the problem was not something that could be easily repaired at the site, the malfunctioning repeater was removed, the inventory repeater was tuned to the frequency and installed, and the malfunctioning radio was returned to the shop where it could be repaired, if possible, and cycled

[10] 800A letters are form letters that the FCC routinely mails to licensees of 800 MHz systems inquiring as to the date and particulars of station construction. Tr. 983-894.

back into the inventory. Tr. 956. As a result of this procedure, equipment was constantly being recycled, and Kay did not maintain records that associated and tracked a particular piece of equipment to a particular call sign. Tr. 956.

88. This practice regarding inventory and record keeping was reviewed by James P. Hanno, an expert witness with over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Mr. Hanno stated:

> The procedure described above is typical of most SMR operations with which I am familiar, especially those using modular, rack-mounted units. As practiced by Mr. Kay, the only records maintained in these instances are any purchase invoices, shipping statements, *etc.*, associated with the purchase, delivery, and acceptance of the repeater, and possibly any work orders for specific installations or repairs. It is my understanding that Mr. Kay does not maintain detailed serial number records tracking all the changes and repairs made with respect to a specific licensed location, nor does he maintain logs at the repeater locations themselves. In my experience, fewer than half of all SMR operators maintain any more detailed records in this regard than does Mr. Kay.

Id. at ¶ 11.

89. During the course of discovery, Kay provided the Bureau with as accurate and as complete information as possible regarding the dates on which his various facilities were constructed. In those cases where the facilities were neither pre-constructed, already constructed at grant, or there was no 800A letter, Kay did his best to determine the historical construction date by reference to other records, *e.g.*, service invoices. Tr. 902. On or about May 11, 1995, Kay submitted his *Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories*. Attachment A to that filing is a tabulation showing, *inter alia*, the license grant date and construction date for each Part 90 facility licensed to Kay. WTB Ex. 290. For purposes of this proceeding, the parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A, that site was either not timely constructed or that operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered

by this stipulation were not timely constructed or that service on such facilities has been permanently discontinued.

90. The *Wireless Telecommunications Bureau's Statement of Readiness for Hearing* was filed in this proceeding on or about June 3, 1998. Paragraph 14 of that pleading provided: "The Bureau intends to present evidence that Kay did not construct stations WPEE253, WIK726, WIK896, WIK664, WIL260, WIK983, WIH339, WIL469, WIK875, WIK287, WIK374, WNJL306, and WNXW487 by the pertinent deadlines." Kay's uncontested testimony as to each of these stations is as follows:

- WPEE253. Kay testified that this station was already constructed at the time the authorization was granted to him. Before it was licensed to him, Kay had been operating it as a community repeater on behalf of a customer, and it was later converted. Tr. 2363.
- WIK276, WIK896, WIK664, WIL260, WIK983, WIL469, WIK875, WIK287, and WIK374. Kay testified that each of these stations was timely constructed. He specifically recalls having a lease at Sierra Peak, first at the Meridian Building and later at the TLF Building, and timely installing all repeaters that were going into Sierra Peak. Tr. 2363-265.
- WIH339. Kay recalled that this station was initially constructed at Mount Lukens at the time he acquired the authorization by assignment from a customer. Subsequently a location was added at Sierra Peak, and that modification was also timely constructed. Tr. 2365.
- WNJL306. Kay specifically recalls the timely construction of this station at Santiago Peak in January or February 1988 at the Meridian Building, in that he recalls "getting a flat tire 20 miles back in the middle of nowhere." Tr. 2365-2366.

- WNXW487. Kay testified that this station was timely constructed at both authorized locations, Heaps Peak and Santiago Peak, on a timely basis.

(2) System Loading

91. Kay operated stations on a commercial basis providing repeater service to end users. He established repeaters and provided communications service to end users through those repeaters. This is akin to the provision of cellular service. Tr. 864. He offered these services through Specialized Mobile Radio ("SMR") stations that operated in the 800 MHz band, and through private carrier stations that operated in the 470-512 MHz band or "UHF". Tr. 1002, 1108. Kay's UHF stations were licensed in the Business Radio Service. Tr. 960-961. In both the 800 MHz and the UHF bands, Kay also operated community repeaters for customers. Tr. 971. In these circumstances the repeater authorization was held by the customer who either owned the repeater equipment or rented it from Kay. Tr. 938.

92. Prior to 1994, one of the items specified on an application for a private carrier UHF repeater license would have been the number of mobile units to be authorized. Tr. 974. During the period from October 1992 to some time in 1994, one of the items specified in an application for a conventional SMR 800 MHz repeater license was the number of mobile units to be authorized. Tr. 971, 975. Prior to October 1992, mobile units were not authorized as part of an SMR repeater license, and end users were separately licensed for the number of mobiles required by them. Tr. 975-976. Thus, prior to October 1992, two authorizations were effectively required to legitimize 800 MHz SMR repeater operations—the repeater authorization held by the SMR operator, and the end user license held by the user. Tr. 1890-1899. Sometimes, end user applications were submitted concurrently with the repeater application as part of a package filing; at other times, the repeater application and end user applications were submitted separately at different times. It all depended on the particular configuration and circumstances. Tr. 976.

93. The October 1992 date is significant because 800 MHz end user licensing was eliminated as of that date. In August 1992 the Commission amended its rules and regulations to eliminate separate end user licensing as to 800 MHz SMR stations. *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, Report and Order, PR Docket No. 92-79, 7 F.C.C.R. 5558, 71 Rad. Reg. 2d (P&F) 166 (1992). The elimination of end-user licensing became effective on October 8, 1992. 57 Fed. Reg. 40850 (September 8, 1992). After October 1992 the Commission no longer accepted applications for 800 MHz SMR end user licenses. Tr. 972, 1906.

94. When Kay filed applications specifying a number of mobile units, he was generally projecting anticipated loading for as much as twelve months out, *i.e.*, allowing approximately four months for the coordination and procession of the application plus the eight month construction and "in-operation" deadline applicable at the time. Tr. 976-977. In making these projections, Kay relied on his business judgment, his knowledge of the radio industry, his familiarity with his own business, anticipated sales, anticipated need for additional frequencies to meet customer expansion needs, communications with other radio dealers, conversations with his customers, *etc.* Tr. 977. He was making a "crystal ball" prediction, a forecast, a business estimate of anticipated future needs. Tr. 977-978.

95. Kay's computer-based billing system (from which the data in WTB Exs. 19 and 347 was derived) provides neither a complete nor an accurate accounting of the loading on Kay's system. Kay considers the "loading" on a system to include his own "hard paying" customers (*i.e.*, direct customers who pay Lucky's for repeater service); customers of other radio shops who obtain repeater service through Kay's facilities pursuant to special arrangements between those shops and Lucky's; rental units which Southland charged for rental but which Lucky's did not charge for the repeater service; shop radios and "demo" units on hand for internal and other miscellaneous uses. Tr. 1069, 1087, 1116, 1128-1129. In short, the database reflects mobile units

only for accounts for which a bill was generated to send to a customer, Tr. 1153-1154, and even then the billing system database would not accurately reflect many of these units, either currently or historically, for a number of reasons.

96. The database contained no information on any non-current customer who canceled service prior to approximately September 1993—the date the Xenix system was last purged. Tr. 1046, 1087-1088. For customers who are reflected in the database, only their most recent configuration is given. Changes in customer configuration (changes in repeater sites, additions or deletions of units, *etc.*) are not tracked. Tr. 1433. The database was designed solely and exclusively to facilitate billing, not to track loading; it does not accurately reflect loading. Kay often included access to multiple repeater sites as part of a customer's service package, but only billed the customer for one site. For example, a customer might be billed for access to repeaters at Mount Lukens and also given "free" access to repeaters at Sierra Peak, and only Mount Lukens would be reflected in the database. Tr. 1017-1018, 1048-1049. Prior to some time in either late 1993 or early 1994, the customer maintenance screen format did not accommodate a large number of repeater sites without the software causing other problems, and so the so-called "free" sites were not reflected. Tr. 1049, 1106-1107. But whether or not Kay specifically charged for access to a repeater site, if the customer had access to and, in fact, used the site, it was doing so pursuant to Kay's license and was, therefore, properly considered part of the loading on the system. Tr. 1075.

97. The table below shows, in each columns from left to right: (a) the call sign and primary location of each trunked SMR (YX) authorization currently held by Kay; (b) the number of base station repeater channels authorized under the call sign at the primary location;[11] (c) the number of mobiles required to satisfy the 70 mobiles per channel loading criterion;[12] and (d) the actual number of units reflected in Kay's billing records as of November 1995. As shown, Kay's trunked SMR (YX) systems were fully loaded to well over 70 mobiles per channel.

Loading on Kay's Trunked SMR (YX) Systems

Call Sign / Location	Channels	Required	Actual
WNMY402 / Mount Lukens	11	1260	2687[13]
WNPJ874 / Mount Lukens	7	(combined)	(combined)
WNJA910 / Oat Mountain	17	1190	2028[14]
WNSK552 / Castro Peak	3	210	785[15]
WNJL306 / Santiago Peak	9	630	2702[16]
WNXW327 / Heaps Peak	8	560	743[17]
WNKV762 / Snow Peak	3	210	453[18]

98. Kay provided repeater service to end users on a commercial basis acting as a "private carrier" with respect to UHF stations or as an "SMR" with respect to 800 MHz stations.

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[11] The Bureau did not introduce evidence as to the parameters of these particular authorizations, most likely because it made a pre-trial determination "only to proceed with evidence regarding Kay's [alleged] abuses with respect to conventional stations." *Wireless Telecommunications Bureau's Statement of Readiness for Hearing* at p. 8, ¶ 18 (filed June 3, 1998). The Presiding Judge may nonetheless take official notice of these basic authorization parameters, namely, the call sign, the primary location, and the number of authorized channels.

[12] The figures in this column were calculated by multiplying the number of authorized base station repeater channels by 70.

[13] WTB Ex. 19 at pp. 148-157.

[14] WTB Ex. 19 at pp. 157-165.

[15] WTB Ex. 19 at pp. 166-169.

[16] WTB Ex. 19 at pp. 179-177.

[17] WTB Ex. 19 at pp. 178-181.

[18] WTB Ex. 19 at pp. 186-187.

Unlike other Part 90 licensees, commercial service providers experience a constant fluctuation in loading. Customers come and go, customers increase and decrease their mobile counts and otherwise change their configuration, with the result that loading goes up and down over any particular period of time. Tr. 1002, 1116-1117, 1130-1131. Kay kept radios in inventory to be able to respond to these constant changes and fluctuations in customer demand, as well as to be used as loaners, rentals, and demos. The record reflects that Kay maintained an inventory of user radios (both UHF and 800 MHz, both conventional and trunking) from approximately 1,000 to 1,5000 units before the January 1994 earthquake and about 600 to 700 units after the earthquake and now. Tr. 2273-2274, 2494-2495; Kay Ex. 48.

99. In addition to repeater service provided directly to users by Lucky's and/or radios sold or rented to users by Southland, Kay has arrangements with more than two dozen other dealers who use Lucky's repeaters for their own internal shop and demo use, to provide service to loaners and rental units and to provide service to their own customers. Tr. 2374-2377. These dealers, at any given time, have an average of 15 to 20 loaners, demos, and rentals active on Kay's repeater system but which would not be reflected in Kay's computer-based billing system. Tr. 2378-2379. Kay identified a substantial number of these dealers by name, specifically confirming his relationship with them currently and prior to January 1994. Tr. 2379-2382. The billing system, and hence the data reproduced in WTB Ex. No. 19, reflects no loading on certain stations simply because the service area is overlapped by other stations, the specified facility is one licensed under multiple call signs, and other similar idiosyncrasies. Tr. 1107-1113. It also did not reflect "talk-around" use, *i.e.*, units that transmit direct, mobile-to-mobile, without going through the repeater itself, but which nonetheless operate under the auspices of the repeater authorization. Tr. 1078, 1082.

100. Most applications submitted by Kay did not require an examination of loading. Kay recalls only a few times when he was actually required to demonstrate loading on his own

system. Tr. 1221. Kay explained that he had found legitimate ways to avoid the exercise because it was such a complicated task. It required looking at the entire loading situation on the channel by all licensees. If a channel were already loaded to more than the specified level by other co-channel licensees, the loading on the application that he was proposing did not matter. When Kay did have to look at the loading of his own system, he relied on the totality of his business records (computer system, paper records, *etc.*), plus what he knew off the top of his head. Tr. 1221-1226. Another method used by Kay was to "package" repeater applications with the end user applications in such a manner that the question of loading on existing systems of the applicant would be irrelevant because an application "would be granted into a fully loaded environment." Tr. 976, 2342-2343. Indeed, the record contains an example of such a "package" application that was presented by Kay and granted by the Commission. WTB Ex. 311; Tr. 2347-2349.

D. Multiple Applications Issue

(1) Roy Jensen

101. Roy Jensen was employed by Southland from the Spring of 1990 to May 1992. Tr. 1463. He became general manager shortly after joining Southland. Tr. 1464. Neither Jensen nor the Southland employees he supervised had any direct duties with regard to Lucky's. Tr. 1465. Jensen and Kay had late dinners together several times a week during which they would, in Jensen's words, "discuss business in general." Tr. 1493.

102. Jensen's "best recollection" is that Kay asked Jensen sign an application for a land mobile license. Tr. 1484. He believes that WTB Ex. 306 is a copy of that application. Tr. 1486. It is an application for an 800 MHz end user license, FCC File No. 9008511576, seeking authority to operate 37 mobiles. WTB Ex. 306 at p. 1. The applicant is designated as Roy Jensen dba Consolidated Financial Holdings. *Id.* The application was granted by the

Commission, and an end user license (Call Sign WNUG662) was issued, which Jensen received in the mail. WTB Ex. 307; Tr. 1488.

103. Jensen testified that Consolidated Financial Holdings is a business name that he registered some time ago in order to pursue business activities unrelated to his employment at Southland. He does not recall when he took out the name, but it could have been during his first year at Southland, *i.e.*, 1990. He does not recall the nature of the anticipated business project and he states that he never pursued it. Tr. 1478-1479. Jensen denies that Consolidated Financial Holdings ever operated any radios (repeaters or mobiles), Tr. 1485, and he denies that he ever told Kay he wanted to operate 37 mobiles, Tr. 1488. Jensen does acknowledge having done off-hours surveillance work, together with Southland employee Kevin Hessman, providing mobile radio communications support for the Los Angeles Police Department. Tr. 1521-1523.

104. Kay testified that he assisted Jensen in obtaining the user license so that Jensen could use shop radios outside of his employment with Southland to pursue his own business interests. Kay recalled that Jensen "was always involved in one type of would-be entrepreneurship or another .... He always wanted to have his hand in business in some fashion." Tr. 2520. When Jensen expressed admiration and interest in Kay's SMR activities, Kay explained that Jensen could do that as well, and he assisted Jensen in obtaining the end user license and provided Jensen with free use of shop radios to pursue Jensen's outside business activities. Tr. 2520-2521. There was no written agreement between Jensen and Kay. Tr. 1485, 2521.

105. When asked about the termination of his employment with Southland, Jensen testified that he had been "laid off" in May 1992. Tr. 1507. This was a repeat of a false statement that Jensen had previously made to another government agency. *See* Kay Ex. No. 1. In a ruling, dated October 7, 1992, Administrative Law Judge Polly Thomas of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-63549,

concluded that Jensen's "testimony, that he believed after leaving his final meeting with [Kay] that he had been laid off, was not found to be credible." Kay Ex. No. 1 at p. 4. She further found that "when [Jensen] wrote on his application for [unemployment] benefits ... that he had been laid off, he knowingly made a false statement to the Department." *Id.* (emphasis added). "Apparently believing that the real reasons for his being out of work would disqualify him for unemployment benefits, [Jensen] attempted to hide the complete circumstances of his discharge from the Department." *Id.* at pp. 4-5 (emphasis added).

(2) Kevin Hessman

106. Kevin Hessman was employed by Southland from May 1990 to October 1993. Tr. 1796-1797. He obtained the job through his friendship with Roy Jensen. Tr. 1796. He did not have any duties relating to Lucky's. Tr. 1797. He was a stock room clerk; he did shipping and receiving and was an "all around go-fer." Tr. 1797, 1292-1293.

107. Kevin Hessman claims that approximately six months after he began working for Southland, he was approached by Kay and Jensen and asked to sign some FCC application forms. Jensen allegedly told him it was to "to help Jim with the business, and everyone else did it." Tr. 1798. He does not recall Kay saying anything in this meeting; he said Jensen did most of the talking. Tr. 1798-1799.

108. WTB Ex. 308 is an 800 MHz end user license (Call Sign WNXV559) issued on July 1, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 73 mobile units on SMRS Station WNYR747. Hessman recalls receiving this license in the mail at his mother's house where he was residing at the time. Tr. 1798. WTB Ex. 309 is an 800 MHz end user license (Call Sign WNNE920) issued on April 29, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 24 mobile units on SMRS Station WNXS450. Hessman also received this license in the mail. Tr. 1800-1801.

109. Hessman claims that "Hessman Security" did not exist and never operated any mobiles, yet he admits that he was "not surprised" when the licenses arrived in the mail in the name of Hessman Security. Indeed, upon reflection he recalled some sort of discussion about that and just spitballing names of what to call it. I think Hessman Security was what Roy and Jim and me just agreed on .... It was no big surprise when I got the licenses in that name." Tr. 1797, 1808, 1813-1814. When the licenses arrived, he took no steps to have the Commission correct the fact that they were issued in an allegedly nonexistent business name, Tr. 1809-1809, 1814. When the licenses arrived in the mail, Hessman says he asked Kay if Kay wanted them, and Kay said that he did not need them. Tr. 1802.

110. Hessman admits that he occasionally did off-hours "public safety" work using Southland rental radios. Tr. 1803. He also did off-hours volunteer work providing support communications to the Los Angeles Police Department. He recalls that this would involve approximately 40 people, two to a car, assisting with such things as drunk driving patrols. Tr. 1804-1805.

111. Kay recalls that at some point in approximately 1992, Hessman and/or Jensen approached Kay to ask if they could make use of company radios in connection with some sort of off-hours security operations. Kay agreed. They required a couple of channels to adequately cover the Los Angeles area, so Kay selected a couple of 800 MHz channels, prepared the appropriate applications for end user licenses, and had them signed by Kevin Hessman. Tr. 1295-1296. Kay's best recollection at the time is that he believed based on what he was told that the proposed activities involved some sort of after-hours contract security work, and he thinks that he therefore wrote it up as a business use when he prepared the end user applications. The Bureau was unable to produce copies of the actual applications, however, to refresh Kay's recollection. Tr. 1296-1297. Kay did not know the details of what Hessman and Jensen were doing in this regard at the time, because he was not "in the loop." Tr. 1296. He learned only in

the course of this proceeding that they apparently were doing volunteer work for the Los Angeles Police Department. Tr. 1295, 1297. Southland employees recall that Hessman and Jensen were involved together in some sort of after-hours security activity while in Kay's employ. Tr. 2293, 2297-2299, 2315-2316, and Kay also knew that Roy Jensen had been involved with security companies before coming to work for Southland, Tr. 2520.

112. Kay's understanding of the FCC regulations was that, prior to the elimination of end user licensing in October 1992, employees who wanted to use Kay's repeater system in connection with activities outside the scope of their employment with Kay would have to be separately licensed for such use. In addition to FCC licensing considerations, if an employee were going to use Kay's radio system in pursuit of an outside business activity, *e.g.*, contract security work, Kay believed they should be separately licensed as a separate business activity in consideration of potential liability problems. Tr. 1298.

113. Kay Ex. No. 7 is the ruling, dated January 21, 1994, by Administrative Law Judge J. S. Berger of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-30425. When Hessman applied for unemployment benefits after being discharged from Southland employment he alleged that he had been laid off due to lack of work, that Southland was down-sizing, and that his services were no longer needed. Kay Ex. No. 7 at p. 2. In point of fact, however, he had been discharged for cause,[19] in other words,

[19] One of the reasons Kay decided to terminate Hessman's employment was that he discovered Hessman had assisted Roy Jensen (who was no longer employed by Kay at the time) in a plot to embarrass Kay in connection with civil litigation and possibly cause him to incur unjustified sanctions. In attempting to clarify an unrecognized deposit in a Southland bank account, Kay discovered evidence indicating that Jensen had written a check made payable to Southland, given it to Hessman who took it to work and stamped it with a Southland endorsement stamp, and then returned it to Jensen, who deposited it in a Southland account in order to make it appear that Kay was falsely accusing him of not having paid a certain sum of money. Tr. 1293-1294.

fired. *Id.*; Tr. 1293-1294. Judge Berger thus found that Hessman "willfully and knowingly made false statements to obtain benefits." Kay Ex. 7 at p. 3.

(3) Vincent Cordaro

114. Vincent Cordaro worked for Southland from 1991 to May 1995. Tr. 1818, 1867. He briefly held the position of service manager, and then became general manager when Roy Jensen was terminated. Tr. 1818. He had no duties with respect to Lucky's. Tr. 1820. Prior to coming to work for Southland, Cordaro had been the owner of Mobile Radio Service Station ("MRSS"), a two-way mobile radio business that was purchased by Kay. Tr. 1818. Cordaro held an SMR end user license in connection with his business activities at MRSS. Tr. 1885. His duties with MRSS also included assisting customers in obtaining necessary FCC licenses. Tr. 1889. Kay had prepared applications FCC applications for Cordaro when Cordaro owned MRSS. Tr. 1275. MRSS provided radio equipment and service to its customers. It did not directly provide repeater service, but Cordaro make arrangements for MRSS customers to receive repeater service through other licensees, including Lucky's. Tr. 1818.

115. *Rasnow Peak SMR (Management Agreement).* WTB Ex. 322 is a Radio System Management and Marketing Agreement dated November 11, 1994, between Cordaro and Kay. WTB Ex. 323 is a copy of the same agreement as re-executed by the parties on December 30, 1994, to give effect to an option provision contained in the agreement. Tr. 1273-1274. The written agreement provides that Kay will manage Station WNXR890, and SMR repeater that was located at Rasnow Peak,[20] less than two miles from Cordaro's residence at the time. Tr. 1926. The station was managed in largely the same manner as stations Kay managed for Marc Sobel and Jerry Gales, except that Kay recalls that Cordaro made more direct personal use of his

[20] The Bureau did not introduce a copy of the authorization for this station, but the record reflects that it is an SMR repeater facility on 852.4875 MHz at a location known as Rasnow Peak. *E.g.*, WTB Exs. 319 & 321.

station. Tr. 1280. At the time the Rasnow Peak repeater was originally applied for, the channel in question was already loaded to 61 units by other licensees. This means that had Kay desired to apply for the license in his own name he could have easily done so—if his base station license had been accompanied by a proposal to serve a minimum of nine end user units, the application would have been acceptable without regard to loading (or lack thereof) on any other stations licensed to Kay. Tr. 2479-2483.

116. Prior to execution of the written agreement, there was an oral understanding between Kay and Cordaro regarding Cordaro's Rasnow Peak SMR. Tr. 1274. The understanding was that Kay would supply the equipment and would market the station to the extent he could. Cordaro would have free use of mobiles on the station. Kay was to receive the first $500 or $600 (he does not remember the precise amount) of any revenues generated from his marketing of services on the station. Tr. 1276-1277.

117. Cordaro and Kay entered into an oral arrangement whereby Cordaro would obtain a license for an SMR facility located at Rasnow Peak, which was less than two miles from Cordaro's residence at the time, Tr. 1926.

118. *Rasnow Peak SMR (Assignment Application).* WTB Ex. 321 is an application for Commission consent to the assignment of the license for SMRS Station WNXR890 from Cordaro to Kay. The assignor's portion of the application (an FCC From 1046) bears the signature of Vince Cordaro and is dated 11/21/92. WTB Ex. 321 at p. 3. It is accompanied by a notary form executed by Barbara Ashauer indicating that Vince Cordaro appeared personally before her on November 21, 1992, and executed a one page document entitled Assignment of Authorization (the same title appearing on the FCC Form 1046). *Id.* at p. 4. The assignor's portion of the application (FCC Form 574) bears the signature of James A. Kay, Jr. dated 4/24/94. *Id.* at p. 1. Kay explained that, although the Form 1046 had been executed by Cordaro in November 1992, Kay did not file the assignment application until sometime after April 24, 1994,

because it "basically got lost in the shuffle." Tr. 1290. Kay does not specifically recall advising Cordaro in April 1994 that he was filing the assignment application, but he is sure he would have done so. Tr. 1290-1291.

119. Cordaro understands that by executing an FCC Form 1046 he is assigning his rights in a Part 90 radio license to another entity. Tr. 1850. He acknowledges that his signature is on the FCC Form 1046 with respect to SMRS Station WNXR890 (WTB Ex. 321 at p. 3), but he claims the form was not completed (*i.e.*, was blank) when he executed it. Tr. 1850-1851. Cordaro claims that on one or more occasions Kay presented him with blank FCC application forms and asked Cordaro to sign them. Tr. 1851-1853. He claims to have been unaware of the assignment application until after he left Southland and it was called to his attention by Barney Peterson, another Los Angeles area SMR operator. Tr. 1854-1855. On or about April 18, 1995, the Wireless Bureau in Gettysburg, Pennsylvania received a letter, dated April 14, 1995, addressed to Terry Fishel from Cordaro which stated as follows:

> This letter is to serve as formal notification that I do not consent to the assignment of station license WNXR980 to James A. Kay, Jr. or anyone else. Although the referenced filing may include an assignment of authorization signed by me, it was filed under false pretenses.

WTB Ex. 325. Cordaro's signature is on the letter, Tr. 1855, but Cordaro does not recall writing or sending the letter, Tr. 1856.

120. Barbara Ashauer, who notarized Cordaro's signature on the FCC Form 1046 testified that she would not have notarized Cordaro's signature on a blank FCC Form 1046 because the applicable California notary rules prohibit notarizing a signature on any form that is not complete. If there are blanks that are not to be filled in for some legitimate reason, that is to be indicated by putting a line through it, filling in "N/A" to indicate "not applicable," or some similar indication. Tr. 1988-1999. She has never executed a notarization such as this one when information on the accompanying form was left blank. Tr. 1999.

121. Cordaro did not renew the authorization for the Rasnow Peak SMR facility, and the license for Station WNXR890 expired and was purged from the Commission's database. Thus, neither the license nor the management agreement is any longer effective. Tr. 1279, 1947.

122. *End User Licenses.* WTB Ex. 316 is an 800 MHz end user license (Call Sign WPBB695) issued on November 16, 1993, in the name of Vince Cordaro dba VSC Enterprises, and authorizing the operation of 64 mobile units on SMRS Station WNXR890. Kay believes he more than likely assisted in the preparation of the application for this license on behalf of Cordaro, but he could not state for certain without reviewing the application itself which was not made available by the Bureau. Tr. 1282. Kay recognized it as an end user authorization that allowed Cordaro to operate up to 64 units and/or share use with other users on an SMR base station also licensed to Cordaro. Tr. 1282-1283. Kay recalls that the channel was already fully loaded in this area at the time. Kay does not recall how the number of 64 mobile units was arrived at, but the number was largely irrelevant insofar as Kay recalls this channel was already fully loaded by other co-channel users at the time, and no applications for new facilities could be filed regardless of whether Cordaro was licensed for 1 unit or 500 units. Tr. 1283-1284.

123. *Santiago Peak SMR.*. WTB Ex. 317 is an SMR repeater license (Call Sign WNPY680), issued September 30, 1992, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facility on 851.4125 MHz at Santiago Peak, Corona (Orange) California. WTB Ex. 318 is an SMR repeater license (Call Sign WNPY680), issued May 11, 1993, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facility on 851.4125 MHz at Santiago Peak, Corona (Orange) California, and up to 72 associated mobile units. WTB Ex. 317 was issued when end user licensing was still in effect and thus does not reflect any mobiles; mobiles would be separately licensed to the users on one or more end user licenses. WTB Ex. 318 was issued after October 1992, and therefore reflects authority to operate associated mobiles in addition to the repeater itself. It was not uncommon for SMR licensees to

modify their base station licenses to include authority for mobile units after the elimination of end user licensing. Tr. 1286. The licensee address on both versions of the Santiago Peak SMR authorization (WTB Exs. 316 and 317) was Cordaro's home address at the time. Tr. 1829. Kay believes that this authorization was later assigned from Cordaro to Marc Sobel sometime after May 1993. Tr. 1286-1287.

124. *The "Vince Licenses" Note.* WTB Ex. 319 is a handwritten list of information labeled "Vince Licenses". Cordaro requested this list from Kay in late 1992 after Cordaro had received a protest with respect to one of his facilities from Jim Doering, another SMR operator in the Los Angeles area. At Cordaro's request, Kay jotted down a list of pending applications and issued licenses in Cordaro's name. Tr. 1287-1288. The list indicates that Cordaro at the time (1) held an SMRS base station authorization for 852.4875 MHz at Rasnow Peak; (2) had a pending ("recently mailed") application for an associated end user license; (3) had a pending application for a new SMRS base station on 851.4125 MHz at Santiago Peak; and (4) had a pending application for an end user license to use Kay's Santiago Peak SMR Station WNXS753 (and indicates that this is on the same frequency as Doering's SMR). WTB Ex. 19. The document also contains the notation: "Attorney – Curt Brown, Brown and Schwaninger, Atty at law". *Id.* Kay added this information to the list because Cordaro asked who Kay used as an attorney. Tr. 1287-1288.

125. Cordaro admitted that he had in fact asked for the listing set forth in WTB Ex. 319. He initially insisted that he had done so in late 1994 in connection with entering into the written management agreement with Kay (WTB Exs. 322 & 323), Tr. 1825-1826, 1889-1890, but on cross-examination, when confronted with the dates of various authorizations and applications that are referenced in the handwritten list, he equivocated. Tr. 1293-1295. WTB Ex. 319 contains two references to pending SMR end user applications, and such applications were no longer accepted by the FCC after October 1992. It also makes reference to a pending

application for a "new" SMR base station at Santiago Peak on 851.4125 MHz, an application which was granted (and hence no longer pending) in 1992, as indicated by the September 30, 1992, license issue date on the authorization for call sign WNPY680 (WTB Ex. 317). Tr. 1293-1295.

126. *Cordaro's Independent Business Activities.* Cordaro has been an entrepreneur, owning and operating MRSS, long before he came to work for Southland. Tr. 1269. It was fully understood between Cordaro and Kay that Cordaro would be free to pursue outside business interests and activities while he was employed by Southland, "as long as he wasn't banging on competition with [Kay] where he would adversely affect [Kay's] business." *Id.* Kay knew that Cordaro had a company called VSC Enterprises that was involved in a number of different activities, though he was not aware of all the details; and he also know that Cordaro together with a friend name Rudy Catania were in some sort of radio communications activities such as installing cable television systems, master antenna systems, *etc. Id.* Kay also knew that Cordaro had an office in his home. Tr. 1269-1270.

127. Shortly after Cordaro sold MRSS and went to work for Southland, he found himself shifting from being a business proprietor to an employee, and he found that it changed his entire tax structure. In conversations with Kay it was discussed that he could enjoy certain tax advantages by maintaining a business enterprise in his own name, and one way to do this would be for him to own and operate an SMR station. Tr. 1275-1276. It was as a result of this conversation that Kay assisted Cordaro in obtaining the Rasnow Peak SMR license and entered into a management agreement with Cordaro for the station. *Id.*

128. VSC Enterprises is a consulting business started by Cordaro before Kay purchased MRSS. It is still in existence today. Tr. 1837. During the hearing Cordaro denied that VSC used radios or ever told Kay that VSC had a need for radios. Tr. 1837-1838. In 1992 Jim Doering, another SMR operator in the Los Angeles area, had filed a protest against an SMR end

user application filed by Vincent S. Cordaro d/b/a VSC Enterprises, arguing that Kay was the real party in interest behind the application. A responsive letter dated September 4, 1992, was filed jointly on behalf of Cordaro and Kay by Brown and Schwaninger. WTB Ex. 351. The letter response stated:

> Separate and apart from his work for Kay ..., Cordaro also operates a radio communications consulting company. ... Prior to undertaking employment from Kay, Cordaro operated an independent business. Part of the understanding under which Cordaro is employed by Kay is that Cordaro is free to engage in any line of business which is not in conflict with his work for Kay. ... If Cordaro is granted the license which he requests, he will operate the units which he requests as an individual and in pursuit of his independent business activities. Accordingly, Cordaro, and not Kay, is the real party in interest in Cordaro's application.

WTB Ex. 351 at p. 2.

129. Attached to the September 4, 1992, letter was an affidavit, executed by Cordaro on September 4, 1992, in which he "declare[d] under penalty of perjury under the laws of the United States that the foregoing document is true and correct." *Id.* at p. 5. Cordaro admits that it is his signature on the affidavit. Tr. 1841. He says he does not remember whether he saw the September 4 letter before he signed the affidavit, Tr. 1841, but the record indicates that an undated draft of the letter, along with a draft of the affidavit, that had been faxed by Brown and Schwaninger on September 3, 1992, was in Cordaro's possession. WTB Ex. 314; Tr. 1908-1920. It is not Cordaro's practice to sign official documents without reading them. Cordaro acknowledged that the September 4, 1992, affidavit he signed is only one sentence long, that it very clearly made reference to another document, and that therefore knew when he read and signed it that another accompanying document was involved. Tr. 1920.

(4) Jerry Gales

130. Kay has known Jerry Gales since the 1980's. Tr. 1240. Gales was an SMR operator in the Los Angeles area long before Kay knew him. He operated a trunked system at Oat Mountain and another conventional channel that Kay later purchased from him. Tr. 1243.

Gales had health problems which prevented him from doing many of the physical things associated with maintaining an SMR, *e.g.*, going up to the mountain tops, *etc.*, so he made an arrangement with Kay so that Kay's people could handle those matters. Tr. 1243. WTB Ex. 326 is a written management agreement, dated November 2, 1994, between Gales and Kay, with respect to Station WPFF295. Gales and Kay had an oral arrangement regarding this station prior to November 1994, and it would probably have been entered into about the time Gales first obtained the license for this station. Tr. 1240-1241. Under this arrangement, Kay would provide the equipment, construction, and maintenance of the station, and would market services on the station. Tr. 1245. Gales did not participate in the physical construction and maintenance of the station due to his health condition, but he knew personally the persons who would have done it, *i.e.*, either Kay or Marc Sobel. Tr. 1242, 1245-1246. In partial compensation under this arrangement., Kay provided Gales with free office space at his Van Nuys facility so that Gales could continue to pursue his land mobile sales and marketing activities. Gales operated out of the free office provided to him by Kay from mid-1990 until approximately 1996. Tr. 1244.

131. The station was managed in largely the same manner as the stations Kay managed for Marc Sobel and Vince Cordaro. Tr. 1280. Kay understood that the written agreement was a standard boilerplate agreement used by Brown and Schwaninger. Tr. 1246. It was "[o]ne hundred percent prepared by [Brown and Schwaninger]. They apparently used it for all their clients." Tr. 1247. Kay later learned that after the Commission had designated Marc Sobel for a license revocation hearing based on this agreement, Brown and Schwaninger did "the equivalent of an automotive recall of all these agreements and re-wrote them and even notified all their clients if they had one of these contracts it needed to be rewrote." Tr. 1247.

(5) Carla Marie Pfeifer

132. Kay and Carla Pfeifer first became acquainted in the mid-to-late 1970's. Tr. 1538. At that time Kay operated a shop dealing with citizen's band and side band radios, and Ms.

Pfeifer's first husband, who was getting involved in CB, met Kay through a friend. Kay, Pfeifer, and Pfeifer's first husband became social friends. Tr. 1539. Kay and Pfeifer were in the same bowling league, and they gathered together at friends' homes for holiday dinners, birthdays, or just to visit. Tr. 1575. This was a long term relationship. *Id.* Pfeifer was never employed by Kay, but, on and off during the time from the early 1980's to the early 1990's she did occasionally visit his shop on Saturday's and would pitch in and help with customers if Kay's staff was too busy. Tr. 1539-1540. This was something that happened very sporadically, that she did simply out of friendship with Kay, and for which she did not get paid. Tr. 1574-1575.

133. WTB Ex. 305 is an SMR repeater license (Call Sign WNHD783), issued January 23, 1990, to Carla Pfeifer, authorizing a facilities on 851.3625 and 854.3875 MHz at Castro Peak, Malibu (Los Angeles) California. Kay assisted Pfeifer in obtaining this license pursuant to an arrangement whereby Kay was to construct the station and market service and when it was filled with users Pfeifer would share in the service revenues. Tr. 1541-1542. Pfeifer saw this as a business opportunity for herself as well as for Kay—she viewed it as a venture which, if successful, would make money for her as well as for Kay. Tr. 1575. Pfeifer explained that one of the reasons this particular arrangement was that Kay was in a better position financially and professionally to finance and implement the station. Tr. 1576.

134. At the time Pfeifer's conventional SMR authorization for Castro Peak (WTB Ex. 305) was issued, Kay would have been eligible to have held an authorization for the same facilities. Without regard to loading on any existing SMR facilities he may have held at the time, he could have nonetheless applied for the same facilities specified in WTB Ex. 305 as a conventional SMR along with a packaged end user application, or he could have applied for the same facilities as a community repeater operator in the business radio service. Tr. 2432-2433. A "package" filing is one in which the SMR base station license application and one or more end users license applications are filed simultaneously, such that the number of end users being

authorized is sufficient to fully load the channel. In this situation, any loading or lack thereof on existing facilities held by the base station applicant is irrelevant because the new base station "would be granted into a fully loaded environment." Tr. 2343. This was a method frequently used by Kay, Tr. 976, and the record reflects at least one example of such an application that was in fact granted by the Commission. WTB Ex. 311; Tr. 2437-2439.

135. A number of documents were entered into evidence purporting to bear the signature of Pfeifer, but as to which she questioned whether the signatures were in fact hers. Pfeifer testified: "I have discovered over some time that there have been some papers that have been submitted to FCC that I feel are not my signature." Tr. 1554. She offered no independent basis for this belief, however, other than her subjective determination that some of the signatures do not look to her like her own. Thus, while signature on a letter to the FCC dated August 31, 1987 (WTB Ex. 299), "appears to be my signature ... I cannot guarantee it is my signature." Tr. 1554. Similarly, she questions the signature at item 11 of a NABER frequency coordination form (WTB Ex. 303): "It appears to be my signature, but I do not believe it is my signature. ... It does not look like my writing." Tr. 1557-1558. When pressed as to what in particular caused her to question the signature, she simply said it was "[t]he whole signature." Tr. 1558 Assuming it is not her signature, she does not know who wrote it. Tr. 1559. Pfeifer further stated that she does not believe it is her signature on a letter to the FCC dated August 4, 1987 (WTB Ex. 304): "The signature on this particular document in no way looks like my signature." Tr. 1559-1560.

136. A number of other documents bear signatures that appear no more or less dissimilar than those discussed above, but which Pfeifer admitted were signed by her. These include: (a) a check dated August 28, 1996 (WTB Ex. 296) Tr. 1546, 1578; (b) a NABER frequency coordination form, at item 11 (WTB Ex. 295) Tr. 1548; (c) a check dated August 28, 1987 (WTB Ex. 302) Tr. 1556; (d) a letter to the FCC dated August 19, 1988 (WTB Ex. 297) Tr. 1557; (e) a letter to the FCC dated August 3, 1987 (WTB Ex. 298) Tr. 1557-1558; and (f) an

invoice (WTB Ex. 301) Tr. 1578. The Bureau did not produce the original documents in question, nor did it present any forensic evidence that the signatures were in fact not those of Pfeifer, much less who (if not Pfeifer) wrote the signatures.

137. Kay expressly denied signing Pfeifer's name to virtually any document in the record purporting to bear her signature, Tr. 2342, 2345-2347, including specifically the documents as to which Pfeifer specifically questioned the genuineness of her signature. Tr. 2435 (WTB Ex. 299), Tr. 2436-2437 (WTB Ex. 303), and Tr. 2437 (WTB Ex. 304). When Kay prepared applications or other FCC-related documents on behalf of Pfeifer, he made copies of them and gave them to her. Tr. 2346. The Bureau did not produce the originals of the documents bearing Pfeifer's signature, and it further appears that the copies in the record did not come from the Bureau's files. None of the documents bears an FCC date receipt stamp, and most of the documents discussed above are labeled across the top with the words "Carla Attachment" and a number. The Bureau does not know whether these are copies of documents from the FCC files or copies of documents which Ms. Pfeifer herself provided to Bureau investigators. Tr. 2334.

(6) Oat Trunking Group, Inc.

138. Oat Trunking Group, Inc. ("OTG") is a corporation of which Kay is the President and sole shareholder. Tr. 862-863. OTG has never had any payrolled employees. Tr. 863, 1267. WTB Ex. 312 is an application in the name of OTG for a community repeater base station together with 29 mobile units. Kay explained the purpose of the application as follows:

> I was going to use it to hold a license for a community repeater and have my corporation share use of that station with other users in accordance with the sharing rules of the FCC, so that's perfectly permissible. I can also have Buddy Corporation employees use the station. Sister corporations with the same management can share stations with each other. There was nothing extraordinary or abnormal about it, sir.

Tr. 1267-1268.

139. The application is signed by Vincent Cordaro who was at that time an officer of OTG. Tr. 863. Asked why Cordaro, rather than Kay, had signed the application, Kay explained:

> I don't recall the precise reasons. If I were to make a best estimate, it's because at that time I was trying to get Mr. Cordaro more involved in the operations of my company to possibly even become an owner in my company. This was dated I think that's 6-8-92. That would be just after he became the general manager of my company, and he wanted to be more involved and possibly become an owner of the company. Since that didn't work out for him is I think one of the reasons he ultimately left my employ. He wanted more than just to be an employee.

Tr. 1268-1269. Kay's association with OTG was never concealed from the Commission. He is listed as the application preparer on the FCC Form 574 in WTB Ex. 312. Another application filed in the name of OTG at approximately the same time sought to convert an existing conventional station to a community repeater. WTB Ex. 311. That application was also signed by Cordaro and also lists Kay as the preparer. *Id.* at p. 2, item 37. It also conspicuously identifies Kay as the licensee of an associated SMR facility. *Id.* p. 2, item 38. The transmittal letter covering the application, moreover, is signed by Kay and very clearly explains Kay's involvement in the proposal. *Id.* at p. 1.

E. Interference Issue

140. In May 1992, Paul Oei, an electronics engineer employed in the Commission's Los Angeles field office, Tr. 1345, 1360-1361, accompanied another FCC employee, Mr. Ben Nakamiyo, on an investigation of an interference complaint against Kay. Tr. 1352-1353. Nakamiyo, not Oei, was the FCC official responsible for the investigation, and Oei was along on the trip as part of his training. Tr. 1361-1362. Jim Doering, another Los Angeles SMR operator and a competitor of Kay, had complained that Kay was rebroadcasting one or more signals from one frequency onto another from his Van Nuys office location. Tr. 1353. Doering complained that these retransmissions were causing interference to a facility licensed to him on the frequency 854.4875 MHz at Santiago Peak. Tr. 1370.

141. Nakamiyo and Oei visited Kay's office location at Van Nuys and asked to inspect a control station there. Tr. 1353. Oei testified that a control station normally has a microphone attached to it, but that in this case the control station has a wire or cable connected where the microphone normally would have been. Tr. 1354. Oei testified that Nakamiyo's notes indicated that Kay removed the cable and replaced it with a microphone during the inspection, although Oei himself does not recall observing this. Tr. 1363. Either Nakamiyo or Oei took power measurements from the control station, and Oei took down notes. Tr. 1363.

142. The repeater channel in question that was the subject of the interference complaint was the frequency pair 809.4875 MHz and 854.4875 MHz. The frequency 809.4875 MHz is known as the "input," *i.e.*, the frequency on which mobiles and control stations transmit into the repeater and on which the repeater receives their transmissions. The frequency 854.4875 MHz is known as the "output," *i.e.*, the frequency on which the repeater re-transmits the signals it receives and the frequency on which mobiles and control stations receive the repeater transmissions. Oei and Nakamiyo monitored the allegedly interfering signals simultaneously on the input and output frequencies, and used direction finding techniques to determine that the transmissions on the input frequency were emanating from Kay's Van Nuys office location. Tr. 1365. Oei does not recall whether they made any attempt to determine the source of the transmissions on the output frequency, *i.e.*, which repeater the transmissions were being sent through, Tr. 1365, 1380, and there is no indication in the record that any such determination was ever attempted.

143. During the May 1992 inspection, Kay produced a license, issued to Buddy Corp., that authorized a control station at the Van Nuys location for the purpose of controlling SMR Stations WNMY402 and WNJA910. Tr. 1367-1368. This license authorized transmissions from the fixed location at Kay's office on the input frequency of repeater channels authorized on those two call signs. Tr. 1368-1369. Station WNJA910 is authorized for the base station frequency

854.4875 MHz at Oat Mountain and was so authorized a the time of the May 1992 inspection. Tr. 1369. This is a trunked station, authorized as a "YX," and therefore has exclusive use within a 70 mile radius. Tr. 1381-1382.

144. The Oat Mountain site is less than ten miles from Kay's Van Nuys office location. Tr. 1365-1366. The Santiago site is more than 70 miles away from Oat Mountain. Tr. 1383. Oei admitted that the Buddy Corp. control station license authorized Kay to control the WNJA910 repeater (*i.e.*, make transmissions on the repeater input frequency) from the Van Nuys location without prior monitoring because the repeater was licensed as a "YX" with exclusive use and the Van Nuys control station was within a 20 mile radius of the Oat Mountain repeater site. Tr. 1381-1382. He felt, however, that Kay's "link" configuration (in which Kay was apparently receiving transmission on the output of Station WNMY402 and retransmitting them on the input of WNJA910) was improper because he was using the link as a repeater rather than as a control station. Tr. 1381. Oei could not, however, site a specific rule that prohibits the described configuration. Tr. 1383.

145. Kay gave testimony fully describing and explaining the station that was inspected in May 1992. It consists of four devices: a power supply, two EF Johnson 800 MHz trunked radios (Model No. 8615), and a Rayfield Easy-Link unit that connects the two radios together. Tr. 2484-2485. Kay operated the two EF Johnson radios pursuant to the Buddy Corp. control station license which authorized him to control Stations WNMY402 (Mount Lukens) and WNJA910 (Oat Mountain) from his Van Nuys office location. Both locations are less than twenty miles from Kay's Van Nuys office. Tr. 2486. The configuration takes output from the Oat Mountain repeater and retransmits it through the Mount Lukens repeater, and vice versa. Tr. 2487-2488.

146. The back-to-back linking of two radios in the configuration used by Kay is accomplished with standard, readily available equipment and in full accordance with

manufacturer intentions and recommendations. Tr. 2489; Kay Exs. 44 & 45. The purpose of this is to extend the coverage or "footprint" of each repeater, thereby improving service to the end users. Tr. 2485-2488. Thus, for example, a mobile unit located in Hollywood that can not access the Oat Mountain repeater but can access the Mount Lukens repeater will, by virtue of this configuration, be able to communicate through both repeaters and thus enjoy a much larger service area. Tr. 2488. James P. Hanno, who has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant, testified as follows:

> I have also been asked to comment on the use in the land mobile industry of devices which allow the linking of remote repeater sites. I am familiar with such devices. Essentially, the device receives the output frequency of a channel on one repeater and relays it on the input frequency of a different channel on a repeater at a different location. The device may be co-located with one of the repeater sites, or it may be located at an intermediate point between the two repeaters. This is a common practice in the industry. Its purpose is to extend the communications range of the customer. Without the link, the customer can only communicate to points within the footprint of the specific repeater he is operating on. With the link, his coverage area includes the footprint of the repeater he is operating on plus the footprint of the linked repeater. Several equipment vendors offer off-the-shelf devices designed expressly for this purpose.

Kay Ex. 63 at ¶ 12.

147. Kay understands that he is obligated to avoid interference by coordinating his usage of a non-exclusive channel with other properly licensed co-channel users within a 70 mile radius. Tr. 970. Where he has exclusive use of channel, such as in the case of a licensed "YX" trunked system, however, and operates within the scope of his authorization, he does not believe he is responsible for possible interference to stations located beyond the 70 mile separation. Tr. 2490-2491. Indeed, Mr. Kay testified that Paul Oei had used the term "legal interference" to describe the situation in which two co-channel stations, both properly licensed and separated by one another by the prescribed distance, and both operating within the scope of their authorizations, may nonetheless sometimes interfere with one another. Tr. 2491. For example, Kay's Los Angeles repeater operations often experience "legal interference" from stations

operating in San Diego. *Id.* Kay explained that this is simply an unavoidable consequence of the fact that "the radio signals unfortunately don't politely end at the end of your authorized service area, and oftentimes do play with the other guy's operations." *Id.*

148. Roy Jensen testified that "[t]here were a couple of circumstances that [Kay] explained to me where he claimed to have" interfered with other operators. Tr. 1467. Jensen did not observe this and could give no specific instances of his personal knowledge. Jensen acknowledged that Kay's descriptions of interference situations, schemes, and techniques were "explained to me just because of necessity, understanding customer problems." Tr. 1466. Jensen also acknowledged that there would have been legitimate business reasons for Kay to understand and discuss intentional interference techniques. "[I]f a customer complains about the interference, being able to track it down is a valuable skill." Tr. 1476.

149. Even in the one instance in which Jensen claims to have observed Kay jamming from the tech room at Lucky's, Tr. 1468-1469, Jensen stated that Kay did not hold the channel open for very long and that "[i]t was kind of a demonstration of concept type thing." Tr. 1470. Jensen claims that Kay used a service monitor to transmit on a repeater input to lock onto a repeater, but he does not know what frequency Kay was allegedly transmitting on or what repeater he allegedly locked onto. Tr. 1477-1478. Similarly, while Jensen alleges that Kay claimed to have jammed other operators, he does not know any specific repeater or company name. Tr. 1471.

F. Unauthorized Transfer of *De Facto* Control Issue

150. Although Judge Sippel did not frame a transfer of control issue as such,[21] Judge Chachkin, during the November 30, 1998, prehearing conference placed the parties on notice that it would be necessary to examine the question whether there had been a *de facto* transfer of control of Sobel's stations to Kay in order to resolve whether Kay had an "interest" in the stations for purposes of evaluating the added misrepresentation and transfer of control issue.[22] Accordingly, Kay here proposes findings of fact on the issue of whether there was or was not a *de facto* transfer of control of Marc Sobel's stations to Kay.

151. Sobel has been involved in the land mobile radio business in the Los Angeles area since approximately 1976. Tr. 1707-1708. Sobel was involved in the business before Kay, and actually is the one who introduced Kay to it. Tr. 1712. Sobel is a two-way radio dealer. He sells and services radios, he provides repeater service, he installs and maintains systems for users and for other dealers, and provides consulting services. Tr. 1708. Sobel first became interested in obtaining authorizations for 800 MHz facilities in the early 1990's. Tr. 1707. Prior to that time, his repeaters were operated in the UHF bands (450 MHz and 470-512 MHz). Tr. 1709.

152. Kay and Sobel have been friends for twenty years. WTB Ex. 228 at p. 71; WTB Ex. 229 at pp. 326-327. In the early 1990s, when Sobel became interested in obtaining 800 MHz repeater licenses, he approached Kay for assistance. Tr. 1712. By this time Kay had developed a repeater business that had far surpassed Sobel's in size and scope. *Id.* There were several reasons

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[21] This issue, as framed by Judge Sippel, was to determine "[w]hether, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning Kay's participation in an unauthorized transfer of control, Kay is basically qualified to be a Commission licensee." MO&O 98M-15 at p. 7. In other words, Judge Sippel assumed an unauthorized transfer of control as well as Kay's participation in it, and attempted therefore to limit the scope of the added issue to the impact on Kay's qualifications.

[22] A central question under the misrepresentation and lack of candor issue is what Kay meant when he executed an affidavit on January 24, 1995, verifying under oath the statement that he had no "interest" in Sobel's licenses. WTB Ex. 343 at pp. 4 & 23.

why Sobel turned to Kay for help in pursuing 800 MHz licensing. Kay already held 800 MHz licenses and was familiar with the rules and procedures which were different than for UHF applications. Also, Kay and Sobel were good friends, and Sobel trusted Kay's judgment. Tr. 1712-1713.

153. Kay helped Sobel locate target frequencies to apply for, but Sobel was directly involved in the process. Sobel did not merely accept Kay's recommendations without input or question. Indeed, Sobel sometimes rejected Kay's initial suggestions based on his own information regarding the local industry and environment. For example, in at least one case he declined an initial recommendation because he would have been on the same frequency as a competitor he considered too aggressive. In other cases he determined that the existing loading on the channel by other pre-existing licensees did not permit the authorization of enough mobile units to make pursuit of the channel worthwhile. Tr. 1714.

154. Kay prepared the 800 MHz applications at Sobel's direction and on Sobel's behalf. This was primarily because Kay already had specialized software to do so. Tr. 1714-1715. It was also easier for Kay to do this because he already had the technical information for many of the sites in his computer system. Tr. 1713. Sobel sometimes prepared the applications himself using Kay's computer. Tr. 1715. Regardless of who prepared the 800 MHz applications, however, Sobel always reviewed and signed them. Tr. 1715. Kay never filed an application on behalf of Sobel that was not first reviewed, approved, and signed by Sobel. Tr. 1715-1716. It is typical in the land mobile industry for someone other than the licensee to prepare applications. Licensees rely on frequency coordinators, application preparation firms, equipment vendors, *etc.*, for the preparation of Part 90 applications, even including assistance in selection of frequencies to be applied for. Tr. 1716-1720. If Sobel had engaged the services of a frequency coordinator or an application preparation firm, the services provided would not have been significantly different than those provided by Kay. Tr. 1719.

155. Sobel's home address was used on all applications. Kay has no access to this location, and, therefore, all correspondence regarding Sobel's 800 MHz applications were directed to Sobel. Other than information that might appear on public notice, Kay would have no knowledge of Commission correspondence regarding the 800 MHz applications and licenses except through Sobel. Tr. 1720-1721. Sobel's home address was also designated as an authorized control point on the 800 MHz licenses. Tr. 1721-1722.

156. When Sobel began to receive grants of the 800 MHz licenses, he entered into an oral arrangement with Kay. The essence of the deal was that Sobel would install the stations using equipment Kay had in his inventory; Kay would provide repeater site space for most (but not all) of the stations; Kay would market the system (*i.e.*, resell airtime to end users); and Sobel and Kay would split the revenues beyond the first $600 per month per repeater (the first $600 going to Kay to compensate him for the equipment, site rental, *etc.*). Tr. 1723.

157. Sobel viewed this as a good business arrangement for himself on a number of scores. First, it allowed him to obtain and implement 800 MHz authorizations without having to spend the $6,000 to $7,000 per repeater that would otherwise have been required for the equipment, not to mention the monthly expenses. Tr. 1724. Sobel would also receive an immediate initial return in the form of the hourly rate he charged Kay for installation and maintenance services—functions that he would have performed for no compensation had he decided to pursue the 800 MHz stations independently of Kay. Tr. 1724-1725.

158. It was also advantageous to Sobel to have Kay resell airtime on the 800 MHz repeaters rather than for Sobel to have to market them on his own. Sobel's land mobile business is a one-man operation which keeps him personally occupied at least 30 to 60 hours per week, and sometimes as much as 70 hours per week. Tr. 1726-1727. Kay, by comparison, had a sales staff in place and was already actively marketing 800 MHz services. Tr. 1726.

159. While Sobel could have made the decision to construct, operate, and market the 800 MHz stations independently of Kay, he determined that the arrangement with Kay made good business sense. On his own he would have had to purchase repeater equipment (at approximately $6,000 to $7,000 per repeater), or lease it (at a monthly cost of $200 to $300 per repeater). Tr. 1727. He would also have been required to lease repeater site space. Tr. 1728. In addition, Sobel would not have received compensation for having installed and maintained the stations—thus, he would have been required to do this work himself for no compensation or contract it out, thereby incurring further expense. Tr. 1728-1729.

160. Sobel is not an absentee owner of the management agreement stations. He resides in the stations' service area and is a hands-on owner who has remained actively and fully involved in all aspects of the day to day operations. Except for matters specifically and directly related to Kay's resale of airtime, Sobel has been solely responsible for and directly involved in daily operations. Sobel constructed the facilities and he maintains them. WTB Ex. 328 at pp. 104, 107. He regularly monitors the repeaters and frequently visits the transmitter sites. WTB Ex. 328 at p. 117; Tr. 1734-1735.

161. The price to be charged for repeater service is largely dictated by local industry standard, and Sobel has personally determined when to make adjustments. WTB Ex. 328 at p. 123. He has, on occasion, overruled Kay's initial determination as a reseller regarding the rates to be charged. When special deals are negotiated, Sobel either handles it or knows about it. *Id.* at pp. 129-130. Sobel has the right to approve or disapprove any service contracts entered into by Kay. *Id.* at pp. 128-129. Sobel reviews Kay's customer contracts approximately once or twice per month. *Id.* at p. 122. Sobel also reviews with Kay the decisions regarding which customers to place on which repeaters. *Id.* at p. 123.

162. Kay prepared much of the FCC and frequency coordination paperwork for the 800 MHz repeaters, subject to Sobel's supervision, review, and approval. This was a matter of

convenience. Kay had a special software package that generated the appropriate forms. WTB Ex. 328 at pp. 74-75. On some occasions Sobel actually prepared the applications himself using Kay's computer. *Id.* at p. 74. Nothing was ever filed with the Commission on Sobel's behalf before Sobel reviewed, approved, and signed it. Tr. 1715-1716. This was more than token approval. Sobel is intimately familiar with the application forms and procedures, having prepared his own UHF repeater applications as well as many applications for his clients and customers, Tr. 1714.

163. As previously discussed, the arrangement provided that Kay would provide space to Sobel at some of the sites. At a few sites Sobel leases space from persons other than Kay, and at one site Sobel subleases space to Kay. At the other sites, Sobel either leases or subleases space from Kay. Tr. 1732. Where the space is provided by Kay for Sobel's UFH repeaters (which are otherwise entirely independent of Kay), Sobel makes monthly cash payments to Kay. Tr. 1727. Kay's provision of space for the 800 MHz repeaters, however, is included as part of the arrangement with Sobel. Tr. 1723. A typical mountain top repeater site is a small building, perhaps 1,200 to 1,500 square feet, and some even smaller, next to a tower or antenna structure. Tr. 1710. Inside the building are equipment racks and cabinets, wiring and cabling, transceivers, power supplies, *etc.* Tr. 1710-1711. A small building may house only about five repeaters, while a larger one may have more than 100. Tr. 1711. A given building may house multiple licensees. It is quite common in the Los Angeles land mobile radio community for multiple licensees, even competitors, to share a common repeater and antenna sites in order to realize economies of scale. Tr. 1711, 1732-1733.

164. The arrangement between Sobel and Kay is nothing more than a lease of channel capacity or airtime to Kay which Kay then resells. This is a common arrangement in the Los Angeles land mobile radio community, and one that is perfectly legal under the FCC's policies and precedents. There are several dealers in the Los Angeles area who provide repeater service to